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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JARVIS MONTAY GORDON,

Defendant and Appellant.

C051001

(Super. Ct. No.
04F06497)

A jury convicted defendant Jarvis Montay Gordon of driving in willful or wanton disregard for the safety of others while fleeing a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)). The trial court sustained an on-bail allegation (Pen. Code, § 12022.1) and two prior strikes under the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). After striking the on-bail finding, the trial court sentenced defendant to 25 years to life.

On appeal, defendant contends the trial jury was improperly instructed with CALJIC No. 2.21.2 (witness willfully false). We affirm the judgment.

FACTS AND PROCEEDINGS

About 1:35 p.m. on July 23, 2004, Lieutenant Steven Johnson of the Fulton-El Camino Recreation and Park District spotted a black 1996 Range Rover with tinted windows and 20-inch chrome rims at the intersection of Del Paso Boulevard and Marconi Avenue. Lieutenant Johnson recognized the vehicle and driver from a "wanted poster" he had seen the day before. Defendant was the driver, and sole occupant of the Range Rover.

Lieutenant Johnson followed the Range Rover and informed the Sacramento County Sheriff's dispatch about the SUV. Two marked sheriff's patrol cars pulled behind the Range Rover in the left hand turn lane on southbound Fulton Avenue at El Camino Avenue.

Defendant continued east on El Camino and turned left into a shopping center parking lot. The two deputies activated their lights and sirens and continued following defendant. Defendant drove behind a building and accelerated out, going west on El Camino with the patrol cars in pursuit. As he approached Fulton, defendant drove between a Sacramento Municipal Utility District (SMUD) truck and a telephone pole. The Range Rover was traveling between 35 and 45 miles per hour when it sideswiped the SMUD truck.

The SUV continued to evade the patrol cars, heading west on El Camino and running a red light at Fulton. Defendant drove very dangerously, traveling nearly 60 miles per hour, using the middle and left turn lanes to go around vehicles, and driving west in the eastbound lane. The Range Rover crossed the center divide of Howe Avenue and entered the parking lot of an AM/PM. The SUV struck a parked car as it drove through the parking lot onto Howe Avenue and back on westbound El Camino.

Defendant slowed the Range Rover as it approached Ethan Way and rear-ended a car stopped at a stop light. Eugene McLaughlin, the driver of the stopped car, saw a black man jump out of the driver's side, run around the back of the Range Rover, and head north on foot. A sheriff's deputy chased the only person who left the vehicle and apprehended defendant.

Defendant testified on his own behalf. He was in the Range Rover as it was being driven by his friend Dialo. Defendant had met Dialo two weeks ago at a blackjack table in Las Vegas. Dialo drove the vehicle because defendant believed he had an outstanding warrant for his arrest. Defendant reclined his seat back flat so that he could not be seen while Dialo was driving him.

Defendant met his daughter and her mother at an AM/PM. Natalie Bessard, defendant's former girlfriend and the mother of his daughter, testified that she met Dialo and defendant at an AM/PM on the day of the incident so defendant could give her money for their daughter.

DISCUSSION

Defendant claims the CALJIC No. 2.21.2 instruction was not supported by the evidence, unconstitutionally lessened the prosecution's burden of proof, and unfairly pinpointed the prosecution's case.

Defendant did not object to the instruction. As a general rule, failure to object to an instruction forfeits a claim of error on appeal unless the error affects the substantial rights of the defendant. (Pen. Code, § 1259; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140.) In any event, the trial court did not err in giving the instruction.

The trial court instructed the jury with CALJIC No. 2.21.2 as follows: "A witness, who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who was willfully-- who willfully has testified falsely as to a material point unless, from all the evidence you believe the probability of truth favors his or her testimony in other particulars."

Our Supreme Court has repeatedly upheld CALJIC No. 2.21.2 as a correct statement of law. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 159, and cases cited therein.) The instruction "permits--but does not require--a general inference of distrust where testimony is 'willfully false' in 'material part.' The instruction also authorizes rejection of the witness's testimony as a 'whole' only where appropriate based on 'all the evidence.'" (*Ibid.*)

The challenged instruction “‘does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.’ [Citation.]” (*People v. Beardslee* (1991) 53 Cal.3d 68, 95.) It does not lessen the prosecutor’s burden of proof. (*Id.* at p. 95.)

The instruction did not unfairly pinpoint defendant’s witnesses. The instruction was not limited, expressly or impliedly, to judging defendant’s testimony but was given to the jury as guidance in determining the credibility of the witnesses in general. CALJIC No. 2.21.2 does not single out any witness and is phrased neutrally. (*People v. Turner* (1990) 50 Cal.3d 668, 699.) “The instruction at no point *requires* the jury to reject any testimony; it simply states circumstances under which it *may* do so.” (*People v. Beardslee, supra*, 53 Cal.3d at p. 95.)

CALJIC No. 2.21.2 is appropriate where supported by a "material conflict in witnesses' testimony" (*People v. Allison* (1989) 48 Cal. 3d 879, 895.) The three law enforcement witnesses testified defendant was the driver, a clear conflict with defendant's testimony that Dialo drove the Range Rover. There was also a conflict between the prosecution's witnesses over whether defendant left the driver's or passenger's side of the Range Rover. We conclude there is a sufficient conflict in the testimony to support giving CALJIC No. 2.21.2.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

CANTIL-SAKAUYE, J.